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IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

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"Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)"

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1. Commentators frequently note that we are living in a global information society. Just as raw materials and labor were key resources in the first industrial revolution, intellectual "commodities" – knowledge, creative works, and scientific discoveries - are a central asset in an information or knowledge based economy. A recent book makes the claim, for example, that "intellectual property and its conceptual neighbors may bear the same relationship to the information society as the wage-labor nexus did to the industrial manufacturing society of the 1900s."[1] Another recent work identifies knowledge as a corporation's most valuable resource, as the ultimate substitute for raw materials, labor, capital, and inputs.[2] According to some estimates, more than a quarter of the exports of the United States, the world's largest producer of intellectual property, rely on intellectual property.[3] In the new global economy of ideas, ownership, control, and access to creative works and scientific knowledge have considerable economic import, giving rise to fierce competition over intellectual and creative works, or what one analyst describes as the "knowledge wars."[4]

2. The manner in which creative works, cultural heritage, and scientific knowledge are turned into property has significant human rights implications. Beginning with the provisions of the Universal Declaration of Human Rights (UDHR),[5] international human rights instruments have enumerated the right of an author, creator, and inventor to some form of recognition and benefit from their intellectual products. Article 27 of the UDHR states that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This right is linked to another provision of Article 27: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

3. Building on Article 27 of the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) has similar provisions.[6] Article 15 (1) (c) requires States Parties, the countries which have ratified this instrument, to recognize the right of everyone "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[7] Also like the UDHR, other components of Article 15 link this obligation to the rights "to take part in cultural life"[8] and "to enjoy the benefits of scientific progress and its applications."[9] To achieve these goals, the Covenant mandates that States Parties undertake a series of steps. These include "those

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[1] James Boyle, *Shamans, Software & Spleens: Law and the Construction of the Information Society* (Cambridge, Massachusetts and London: Harvard University Press), 13.
[2] Seth Shulman, *Owning the Future* (Boston: Houghton Mifflin Company, 1999), p. 4.
[3] Ibid., p. 18.
[4] This is the term used by Shulman in *Owning the Future*.
[5] Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res217A (III), 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948).
[6] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc.A/6316 (1966).
[7] Ibid., Article 15 (1) (c).
[8] Ibid., Article 15 (1) (a).
[9] Ibid., Article 15 (1) (b).

necessary for the conservation, development, and diffusion of science and culture." States Parties are also directed to "undertake to respect the freedom indispensable for scientific research and creative activity."[10]

4. Legal regimes defining the nature of intellectual property and the types of protection that accrue to its creators very much shape the realization of this right. Moreover, the very centrality of intellectual property to almost every sphere of economic life means that international treaties, national legal codes, and judicial decisions about intellectual property can have significant ramifications for the protection and promotion of other human rights. This is particularly the case for the economic, social, and cultural rights enumerated in the Covenant.

5. The development of a global economy in which intellectual property plays a central role underscores the need for the human rights community to claim the rights of the author, creator and inventor, whether an individual, a group, or a community, as a human right. It is equally important for human rights advocates to protect the moral interests and rights of the community to securing access to this knowledge. A third human rights consideration is whether relevant laws identifying rights to creative works and scientific knowledge and determining the subject matter which can be claimed as intellectual property are consistent with respect for human dignity and the realization of other human rights.

6. Recent trends underscore the need for a human rights approach. As various economic actors rush to stake claims over creative works and forms of knowledge, human rights are being trampled: creators are sometimes losing control of their works, the free exchange of information so vital to scientific discovery is being constrained, and publicly held resources, including the cultural and biological heritage of groups, privatized. New technologies, such as computers and Internet communications, are raising issues about the relevance of traditional forms of intellectual property protection. The establishment of the World Trade Organization in 1994 and the coming into force of the international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995 have strengthened the global character of intellectual property regimes. In the years ahead the provisions of TRIPS are likely to reshape intellectual property law and relationships within and across countries. Unless human rights advocates provide an effective intellectual and organizational counterweight to economic interests, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights.

7. Noting that actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, the Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution addressing this topic at its August 2000 session.[11] The resolution affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right, subject to limitations in the public interest. It declares:

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[10] Ibid., Article 15 (3).

[11] "Intellectual Property Rights and Human Rights," Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, agenda item 4, E/CN.4/Sub.2/2000/7, adopted August 17, 2000.

that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.[12]

8. It reminds all governments of the primacy of human rights obligations over economic policies and agreements. And it makes a number of recommendations, among them that the World Trade Organization and particularly its Council on TRIPS take existing state obligations under international human rights instruments fully into account during its ongoing review of the TRIPS Agreement. The resolution also requests governments to protect the social function of intellectual property in accordance with international human rights obligations when shaping national and local legislation.

Development of Intellectual Property Regimes

9. Inte'lectual property is a generic term that refers to intangible objects, such as literary works, artistic works, plans for inventions, and designs, which acquire their value primarily from creative efforts. Efforts to protect intellectual property have a long history. Some analysts date the origins of intellectual property as far back as the fourth century BCE to Aristotle;[13] others to ninth century China.[14] Still others trace laws dealing with intellectual property to the system of royal privilege giving that operated in medieval Europe. The Venetians are credited with instituting the first properly developed patent laws in 1474, and their model spread to many other European states in the next one hundred years. Modern copyright law began in England with the 1709 Statute of Anne. [15] The United States Constitution, drafted in 1787, vests the Congress with power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respectful Writings and Discoveries." [16]

10. Historically, countries have adopted laws to protect intellectual property for several reasons. According to the World Intellectual Property Organization (WIPO), an independent specialized agency within the United Nations family of organizations,[17] intellectual property

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[12] Ibid.

[13] Geoff Tansey, "Trade, Intellectual Property, Food and Biodiversity: A Discussion Paper," London: Quaker Peace and Service, 1999, p.3.

[14] Robert L. Ostergard, Jr., "Intellectual Property: A Universal Human Right?" *Human Rights Quarterly* 21 (1999): 157.

[15] Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development," in World Intellectual Property Organization, *Intellectual Property and Human Rights*, WIPO Publication No. 762 (E), (Geneva, 1999), p.15.

[16] Art. 1, Par. 8, Section 8, *The Constitution of the United States*, adopted 1787, Washington D.C.: U.S. Government Printing Office, 1985.

[17] The World Intellectual Property Organization (WIPO) is responsible for the promotion of intellectual property worldwide. It acts as the secretariat for the negotiation of treaties that establish new norms in the field of intellectual property, and administers several treaties. It also conducts extensive programs for training and technical assistance for developing countries.

regimes give statutory expression to the moral and economic rights of creators in their creations and define the rights of the public to access to such creations. The second motivation WIPO identifies is to provide incentives and rewards to inventors and creators and thereby stimulate economic and social development. [18] Beyond these traditional rationales, governments use intellectual property laws as a means to improve the country's competitive economic advantage. This third concern has become an increasingly dominant motive in the global economy. Often these policies favor major economic interests, particularly large multinational firms, to the detriment of protecting public access and benefits in the home country and promoting development in countries in the South.[19]

11. Intellectual property has three customary legal domains: copyright (author's rights), patent, and trademark. Various legal regimes have evolved over time, each of which, to different degrees, recognizes rights of ownership in a particular form of intellectual subject matter under specific conditions for designated periods of time.

12. Copyright, which is called author's rights in most European languages other than English, is a branch of the law dealing with the rights of intellectual creators. The subject matter of copyright protection covers original works in the literary, scientific, and artistic domain, whatever the mode or form of expression. Copyright grants authors and other artistic creators of works of the mind (literature, music, art) rights to authorize or prohibit, for a specific limited time, often 99 years, use made of their works. In so doing, copyright awards limited monopolies to creators related to their creations so as to control the right to make copies of a given work. Generally copyright protects the expression of the author's ideas in tangible form rather than the ideas themselves.[20] Copyright protection is justified as an important means of encouraging authors and artists to create, thereby promoting, enriching and disseminating a nation's cultural heritage.

13. A patent is a document issued by a government office, upon application by an inventor, which describes an invention and creates a legal situation in which the patented invention requires authorization of the owner for any use, such as manufacture or sale. Simply put, a patent is a monopoly granted by the state to an inventor for a limited period, in return for the disclosure of the invention, in order to enable others to have the benefit of the invention. The effect of the grant of a patent is not that the owner is given a statutory right to exploit the invention; instead it gives the owner the legal authority to prevent others from exploiting his/her invention.[21] Generally laws require that, in order to be eligible for patent protection, an invention must meet several criteria:[22] (1) the invention must be new or novel; (2) it must be nonobvious (or involve an inventive step);[23] and (3) it must be useful or industrially applicable. Patenting regimes also generally exclude certain specific kinds of inventions from the possibility

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[18] World Intellectual Property Organization, *Intellectual Property Reading Material*, WIPO Publication No. 476 (E), Geneva, 1995, p.5.
[19] Shulman, *Owning the Future*, p.19.
[20] World Intellectual Property Organization, *Intellectual Property Reading Material*, pp. 4-8.
[21] Ibid., p.129.
[22] Ibid., pp. 130-133.
[23] In technical terms, the question is whether or not the invention "would have been obvious to a person having ordinary skill in the art."

of patenting, [24] either because certain types of objects are considered inappropriate for private ownership or for ethical reasons. TRIPS, building on the precedent of the European Patent Convention Agreement, for example, allows members to exclude subject matter from patenting on the grounds "to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment." [25]

14. A trademark is a sign or name that individualizes the goods of a given enterprise so as to identify the source and thereby distinguish the items from the goods of competitors.[26] Like patents, a trademark can be registered with the competent government authority, which in most countries is the same as the authority that processes patent applications.[27]

15. Intellectual property law was developed on a national basis, with considerable diversity in the nature and stringency of protections. As international commerce increased during the nineteenth century, however, states became interested in developing some forms of international collaboration and harmonization. At first, countries concluded a series of bilateral agreements, but this was cumbersome and often ineffective. The next step was the formulation of two major agreements that provided international standards. These were the Paris Convention of 1883 for industrial property (patents and trademarks) and the Berne Convention of 1886 for the protection of literary and artistic works (copyright or author's rights), both of which subsequently were revised several times. Nevertheless, many countries chose not to abide by these agreements and suffered few ill consequences. The U.S., for example, never ratified the Berne Convention. Although international secretariats were established for both the Paris and the Berne conventions and then merged to form a United International Bureau for the Protection of Intellectual Property (currently superceded by the World Intellectual Property Organization), the enforcement mechanisms were very weak.

16. In recent years, industrialized countries, led by the United States, have pushed for increased global protection of intellectual property and the establishment of a global intellectual property regime. The TRIPS Agreement, which was a product of the Uruguay Round of trade talks, is binding in toto on all members of the World Trade Organization. It sets mandatory minimum standards for national protection of intellectual property that require states to implement a common and often expanded set of intellectual property protections. It also imposes enforcement measures, including potential trade sanctions against nations that do not comply with these standards. Provisions of the TRIPS Agreement make it far more difficult for countries to set intellectual property standards and policies to fit domestic economic conditions, as well as to protect human rights and the environment.

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[24] Ibid., p.9.
[25] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994), Section 5: Patents, Article 27 (2), published in a collection of documents compiled by the World Intellectual Property Organization, WIPO Publication No. 223 (E), Geneva 1997.
[26] World Intellectual Property Orgaanization, *Intellectual Property Reading Material*, pp. 191-2.
[27] *Bid., 202.*

17. Not only have intellectual property regimes become globalized, the scope of the subject matter considered to be eligible for intellectual property protection has also expanded. This has occurred in several ways. First, restrictions and limitations that previously excluded specific types of subject matter from patenting have been eliminated. The patenting of biological entities constitutes one example. Prior to 1980, some two hundred years of legal doctrine conceptualized life forms as "products of nature" rather than as a human invention and therefore unable to meet the three criteria for patents: novelty, utility, and non-obviousness. These standards were overturned by a landmark U.S. Supreme decision, *Diamond v. Chakrabarty*, which ruled that a genetically modified strain of bacteria capable of degrading components of crude oil was patentable as a new and useful manufacture or composition of matter.[28] Subsequently, the U.S. Patent and Trademarks Office, followed in many cases by the European and Japanese patent office, began to grant biotechnology patents on new plant varieties, nonnaturally occurring nonhuman multicellular living organisms, including animals, and discoveries of naturally occurring human gene sequences.[29] Other extensions have resulted from adapting legal instruments to fit new situations and technologies, as for instance, efforts to extend copyright print protections into the digital domain. A third trajectory is the expansion of private intellectual property claims into areas that formerly were part of the public domain, such as the privatization of works of cultural heritage and the biological and ecological knowledge of traditional peoples.

Drafting of the Intellectual Property Provisions of UDHR and ICESCR

18. The drafters of the UDHR and ICESCR decided to recognize the intellectual property claims of authors, creators, and inventors as a human right. Why did they decide to do so? And how did they conceptualize this right? And was it just accidental that drafters of both documents link the intellectual property claims of authors and creators with the rights to participate in cultural life and to enjoy the benefits of scientific progress and its applications, or did they understand these three to be intrinsically interconnected?

19. To address the first of these questions, a review of the *travaux preparatoire* of the drafting committee for the UDHR operating under the aegis of the United Nations Commission on Human Rights reveals that Mexican and Cuban members of the drafting committee, supported by the French delegate, played a major role. They introduced the language on author's rights so as to harmonize the Universal Declaration with the provision on intellectual property in The American Declaration on the Rights and Duties of Man (1948). Article 13 of the American Declaration states that:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

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[28] *Diamond v Chakrabarty* 477 U.S. 303 (1980).

[29] For a discussion of this development and its ethical implications see Audrey R. Chapman, "Background and Overview," in Audrey R. Chapman, ed., *Perspectives on Gene Patenting: Religion, Science, and Industry in Dialogue* (Washington, D.C.: American Association for the Advancement of Science, 1999): 13-17.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.[30]

20. The Mexican representative argued that the United Nations needed the moral authority to protect all forms of work, intellectual as well as manual to safeguard intellectual production on an equal basis with material property. (Provisions of the draft of the UDHR already recognized the right to work.) The proposed provision survived criticisms that intellectual property needed no special protection beyond that afforded generally by property rights (already in Article 17 of the Universal Declaration), as well as claims by other members of the drafting committee that special protection for intellectual property entailed an elitist perspective.[31]

21. The text of Article 15 of the ICESCR closely resembles Article 27 of the UDHR. Like the UDHR it has three components dealing with right to culture, scientific advancement, and intellectual property. However, this came about only after heated debate about whether to include the intellectual property provisions. The basic proposition that became Article 15 of the Covenant was first proposed by the U.S. representative, incorporated an amendment by Lebanon, was then adopted by the Commission on Human Rights. Interestingly, when the Third Committee initially received the draft Covenant from the Commission on Human Rights, it lacked the language of what was to become 15 (1) (c) recognizing the rights of authors and creators. This omission was pointed out by the Israeli delegation and was then discussed. Representatives of Costa Rica and Uruguay then moved to amend the Covenant to reinsert this provision of the UDHR. The USSR and the Eastern bloc, reflecting their socialist interests and the dynamics of the cold war, strongly objected to incorporating the provision on intellectual property. They argued that the people's right to benefit from science should not get intermixed with property rights. The socialist bloc's opposition to property rights had already played a major role in the decision of the Covenant's drafting committee to omit the text of Article 17 of the UDHR recognizing the right to tangible forms of property in the Covenant.[32]

22. There again was considerable controversy regarding author's rights when the General Assembly took up consideration of the article in 1957. Again, the Eastern bloc attempted to delete this provision. The representative of the Soviet Union claimed, for example, that author's rights were too complicated and varied to draw up a clause that would be valid for all states. A representative of the United Nations Educational, Scientific and Cultural Organization

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[30] American Declaration of the Rights and Duties of Man, Approved by the Ninth International Conference of American States, Bogota, Columbia, March 30 to May 2, 18, 19. Resolution XXX, Pan American Union, Final Act of the Ninth Conference, 38-45, Washington, D.C., 1948.

[31] *Official Records of the Third Session of the General Assembly*, Part I, "Social and Humanitarian and Cultural Questions," Third Committee, Summary of Records of Meetings, September 21- December 8, 1948, pp. 619-34.

[32] UN Commission on Human Rights, "Report of the 8th Session," April 14-June 14, 1952, ECOSOC Records, supplement No. 4; UN General Assembly, 12th Session, Third Committee, Agenda Item 33, "Article 16 of the Draft Covenant on Economic, Social and Cultural Rights" (E/2573, Annex IA), General Assembly Twelfth Session Official Records, A/C.3/SR.795, pp. 169-191. The numbering of articles at this point of time differed from the final text that was adopted.

(UNESCO) defended the need to retain language on author's rights.[33] The Uruguayan and Costa Rican delegates cosponsored an amendment to that effect arguing for it on three grounds: the UDHR already recognized this right; by incorporating the provision the work of UNESCO in this area would be given new impetus and prestige; the right of the author and the right of the public were complementary, not opposed; and respect for the right of the author would assure the public of the authenticity of works presented to it.[34] A statement by the Israeli delegate went further. He argued that "it would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected."[35] In the end, of course, the arguments of those defending author's rights won the day.

23. This history underscores that the three provisions of Article 15 in the ICESCR were viewed by drafters as intrinsically interrelated to one another. Three major human rights instruments – the American Declaration, the UDHR, and the Covenant – enumerate these rights as components of a single article. The rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedom and participation and scientific progress.

24. Conversely, human rights considerations impose conditions on the manner in which author's rights are protected in intellectual property regimes. To be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote other components of Article 15. Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and scientific progress and access on the other.

A Human Rights Approach to Intellectual Property

25. Very little attention has been paid to the interpretation of intellectual property as a human right. The human rights community has neglected Article 27 of the UDHR and Article 15 of the Covenant. Indigenous rights advocates have constituted the major exception. There is very little literature conceptualizing the scope of Article 15 of the Covenant and the concomitant obligations of States Parties. The Committee on Economic, Social and Cultural Rights, the United Nations treaty monitoring body overseeing ICESCR, rarely deals with intellectual property issues. It has planned to hold its first review of intellectual property in a day of general discussion on this subject scheduled for November 2000. Although there is a considerable body of legal practitioners dealing with intellectual property, they tend to focus on commercial issues and rarely address the ethical and human rights dimensions of intellectual property regimes.

26. So what can be said about the difference between a human rights and a more narrowly legal or economic interpretation of intellectual property? Intellectual property conceptualized as a universal human right differs in fundamental ways from its treatment as an economic interest

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[33] Official Records, United Nations General Assembly Twelfth Session, Agenda item 33: Draft International Covenants on Human Rights, Article 16 of the draft Covenant on Economic, Social and Cultural Rights (E/2573, Annex 1), Third Committee, 796th meeting, 31 October, 1957.
[34] Official Records, United Nations General Assembly, Agenda item 33, 789th meeting, 1 November 1957, par. 32, p. 183.
[35] Ibid., par. 37, p.184.

under intellectual property law. I believe there are several considerations. The language of the Covenant underscores the importance of the obligation to respect the moral and material interests of the author, artist, inventor, or creator. In contrast with the individualism of intellectual property law, a human rights approach also recognizes that an author, artist, inventor, or creator can be a group or a community as well as an individual. A third characteristic is an acknowledgement that intellectual products have an intrinsic value as an expression of human dignity and creativity. Put another way, artistic and scientific works are not first and foremost economic commodities whose value is determined by their utility and economic price tag.

27. A human rights approach takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. A human rights approach is predicated on the centrality of protecting and nurturing human dignity and the common good. From a human rights perspective, therefore, the rights of the creator are not absolute but conditional on contributing to the common good and welfare of the society. The wording of Article 15 is noteworthy: States Parties are directed to ensure that everyone will be able "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This is far short of vesting creators, authors, and inventors with full and unrestricted monopoly property rights.

28. A human rights approach also establishes a different and often more exacting standard for evaluating the appropriateness of granting intellectual property protection to a specific artistic work, invention, or set of knowledge than those specified under intellectual property law. Intellectual property law generally emphasizes originality as a basis for determining eligibility for copyright protection; to be eligible for patent protection an invention or discovery must meet the criteria of novelty, utility, and non-obviousness. In order for intellectual property to fulfill the conditions necessary to be recognized as a universal human right, however, intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realization of the other human rights, particularly those enumerated in the Covenant.

29. A human rights approach must be particularly sensitive to the interconnections between intellectual property and the rights "to take part in cultural life" and "to enjoy the benefits of scientific progress and its applications." To be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level. These considerations go well beyond a simple economic calculus often governing intellectual property law.

30. A human rights approach further establishes a requirement for the state to protect its citizens from the negative effects of intellectual property. To do so, governments need to undertake a very rigorous and disaggregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure nondiscrimination in the end result. When making choices and decisions, it calls for particular sensitivity to the effect on those groups whose welfare tends to be absent from the calculus of decision-making about intellectual property: the poor, the disadvantaged, racial, ethnic and linguistic minorities, women, rural residents.

31. The human rights principle of self-determination as enunciated in Article 1 (1) of the Covenant and reflected in the civil and political rights defined in the International Covenant on Civil and Political Rights emphasizes the right of all members of society to participate in a meaningful way in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the development of intellectual property regimes. To achieve in practice, it requires open and democratic political institutions that can adapt to technological change.

Proposed Obligations of States Parties

Minimum Core Obligation

32. The minimum core obligation refers to the obligations incumbent on all States Parties regardless of their level of resources, the nature of their culture, or the character of their political system. As noted above, to date intellectual property norms have rarely been dealt with from a human rights perspective. For that reason, this paper will propose a minimalist approach to a minimum core obligation.

33. The language in Article 15 (1) (c) of the Covenant imposes an obligation on States Parties to develop a mechanism through which to protect the moral and material interests of authors and inventors. While the Covenant requires all States Parties to provide some form of intellectual property protection, it offers wide latitude regarding the manner in which this is done. To be consistent with human rights norms, the paradigm that is adopted, as well as the subject matter considered to be appropriate for intellectual property protection, must meet the following criteria:

- Intellectual property regimes should have an explicit human rights and ethical orientation. This requires States Parties to restrict the subject matter eligible for intellectual property protection so as to eliminate inventions that are inconsistent with protecting human dignity. The European Union provides one potential model of an effort to reconcile patent law with principles of human dignity and the ethical norms of the society. Article 53 (a) of the European Patent Convention specifically stipulates that patents should not be granted for inventions "the publication or exploitation of which would be contrary to '*ordre public*' or morality." Several provisions of a recent Directive of the European Parliament and of the Council on the legal protection of biotechnological inventions reiterate this principle. The Directive also excludes inventions from patentability that offend against human dignity and ethical and moral principles recognized in member states.[36]

- Intellectual property law should incorporate explicit human rights and ethical provisions as criteria for the evaluation of applications for patents and trademarks and develop an institutional mechanism capable of making these determinations. In most cases patent and trademark offices are not competent to undertake such a review and are inclined to

[36] Paras. 37-40, "Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions," *Official Journal of the European Communities*, 30.7.98, L 213/16.

subordinate human rights considerations to an economic calculus. Therefore a meaningful human rights input requires some the establishment of a body competent to review patent and trademark decisions on human rights grounds and/or the ability to appeal decisions to a court or tribunal able to make a determination of the human rights implications. This body should have the jurisdiction to invalidate an existing or pending patent by virtue of a ruling that it would infringe on human rights or be inconsistent with ethical principles or the cultural norms of major groups in the society.

- The nature of the intellectual property regimes adopted must reflect the country's development requirements and be consistent with the cultural orientations of major groups. Even the TRIPS Agreement offers some flexibility to countries bound by its provisions. Article 27.3(b), for example, allows members to exclude plants and animals from patentability. There is also a provision in TRIPS (Article 27.2), based on the European Patent Convention, which enables members to "exclude from patentability inventions, the prevention within their commercial exploitation of which is necessary to protect *order public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment."[37] TRIPS does not prohibit countries from the practice of parallel importing whereby products under patent or copyright protection in one country are imported from a second country where they are available at a lower price.[38] Compulsory licensing, whereby countries restrict the monopoly rights of patent holders, is another strategy permissible under some circumstances.

- To promote realization of the right to cultural participation, States Parties should develop intellectual property regimes that are consistent with the practice and revitalization of cultural traditions within their country. This includes the right to maintain, protect and develop both past and present manifestations of cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies, and the arts and literature. Paragraph 29 of the Draft Declaration on the Rights of Indigenous Peoples recognizes that "Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral tradition, literatures, designs and visual and performing arts."[39]

  At present, traditional and indigenous knowledge and artistic works rarely qualify for intellectual property protection and for that reason are vulnerable to expropriation and inappropriate utilization by persons outside the group. It is difficult to use copyright laws because copyright laws recognize only a single owner; traditional motifs and folklore are not the sole property of individual artists to sell or withhold freely, but are subject to layers of

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[37] TRIPS Agreement (1994), Section 5, Article 27 (2), reprinted in WIPO Publication 223 (E), Geneva, 1997.

[38] The product may be available at a lower price as a result of price control or where a compulsory licensee is producing a product at a lower cost.

[39] Draft Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the Working Group on Indigenous Populations at its Eleventh Session, August 23, 1993, United Nations Document E/CN.4/Sub.2/1993/29.

group rights. Additionally, copyright protections are of limited duration while indigenous people regard cultural rights as perpetual.[40] A third limitation is that under copyright law fixation or reduction to material form is a condition and much of traditional knowledge is in the form of oral resources, like folklore. The practical consequence is that ideas, themes, styles, and techniques that are embodied in a work are not protectable.[41]

To be eligible for patenting, knowledge or an invention must be novel and innovative; while indigenous knowledge and art have innovative elements, they are based on continuity with a tradition. Moreover, patent rights are ordinarily granted to individuals or corporations, rather than to cultures or peoples, and have time limitations further limiting the usefulness of patents for the protection of cultural heritage.[42]

The development of appropriate protections therefore requires adapting existing intellectual property instruments and/or developing new types of intellectual property rights. There are several options. One alternative is to enact a *sui generis* system of intellectual property rights, possibly a hybrid between standard patent law and copyright protection.[43] A *sui generis* (of its own kind) system of protection means that countries can make their own rules provided that the protection is effective. Trademark protection could be used for handicrafts to facilitate the ability of indigenous' peoples to interpret and defend the integrity of their cultures; traditional artists could be encouraged to organize community cooperatives with distinct trademarks for their products.[44]

- Intellectual property rights related to science should promote scientific progress and broad access to its benefits.[45] To do so, these protections must respect the freedom indispensable for scientific research and creative activity. Intellectual property regimes must also encourage the development of international contacts and cooperation in the scientific field. Consistent with the 1975 Declaration on the Use of Scientific and Technological Progress in

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[40] See, Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, "Discrimination against Indigenous People: Study on the protection of the cultural and intellectual property of indigenous peoples, " UN Doc. E/CN.4/Sub.2/1993/28, par 130.

[41] Joseph Wambugu Githaiga, "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge," Murdoch University Electronic Journal of Law, 5 (June 1998): http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52-body.html , par. 22.

[42] Ibid., par. 135.

[43] The suggestion to do so modeled on protections of computer software was made by the UNEP Executive Secretary in 1996 in a document on "Knowledge, Innovations and Practices of Indigenous and Local Communities: Implementation of Article 8(j)" written for the Third meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/3/19.

[44] This is recommended by Erica-Irene Daes, par. 58, "Discrimination Against Indigenous Peoples."

[45] See, Audrey R. Chapman, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science," in *Intellectual Property and Human Rights*, WIPO Publication No. 762 (E), (Geneva; World Intellectual Property Organization, 1999).

the Interests of Peace and for the Benefit of Mankind,[46] all states should also take appropriate measures to extend the benefits of science and technology to all strata of the population. Another requirement is that States Parties should protect their population from possible harmful effects of the misuse of scientific and technological developments.

34. Consistent with the requirements of Article 15 (4) and the increasingly globalized character of intellectual property regimes,

- States Parties should be supportive of efforts by other countries to develop international contacts and cooperation in the scientific and cultural fields.

- Governments of industrialized countries should be sensitive to the special needs of less developed countries and be supportive of proposed measures and interpretations of the TRIPS accord that would to provide them with greater flexibility for scientific and cultural development.

- States Parties should refrain from efforts to interfere with the policies of other countries.

Other Obligations of States Parties

- The human rights principle of self-determination enunciated in Article 1 (1) of the Covenant and the various civil and political rights defined in the International Covenant on Civil and Political Rights emphasize the right of all members of society (or their elected representatives) to participate in a meaningful way in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the nature of intellectual property regimes and the manner in which they affect the development of culture, science, and technology.

- States Parties should develop an adequate process of review to anticipate potential harmful effects resulting from the patenting of specific products and processes and to deny intellectual property protection to these items. Many technologies, such as the widespread production of toxic chemical substances and the genetic revolution, pose substantial risks as well as potential benefits. Technologies frequently bring an inequitable distribution of costs and benefits: one group benefits while other groups bear the brunt of the risks and indirect costs. Recognizing this problem, the 1975 United Nations Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind [47] recommended that "All States shall take appropriate measures to prevent the use of scientific and technological developments, particularly by the State organs, to limit or interfere with the enjoyment of the human rights and fundamental freedoms of the individual as enshrined in the Universal Declaration of Human Rights, the International Covenants on

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[46] "Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind," General Assembly Resolution 3384 (XXX) of 10 November 1975.
[47] "Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind," proclaimed by General Assembly Resolution 3384 (XXX) of 10 November 1975.

Human Rights and other relevant international instruments."[48] The Declaration also specified that "All States shall take measures to extend the benefits of science and technology to all strata of the population and to protect them, both socially and materially, from possible harmful effects of the misuse of scientific and technological developments, including their misuse to infringe upon the rights of the individual or of the group, particularly with regard to respect for privacy and the protection of the human personality and its physical and intellectual integrity."[49]

Related Obligations of States Parties under Article 15

35. Article 15 (2) mandates that the steps to be taken by States Parties "shall include those necessary for the conservation, the development and the diffusion of science and culture."

36. Article 15 (3) directs that States Parties "undertake to respect the freedom indispensable for scientific research and creative activity." Academic freedom is one critical component of the freedom indispensable for scientific research and creative activity. The Committee has outlined some of the requirements of academic freedom in "General Comment No. 13: The right to education (article 13 of the Covenant)." According to General Comment 13, "Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction."[50] It goes on to state that the enjoyment of academic freedom also requires the autonomy of institutions of higher learning.[51]

37. Adherence to basic human rights norms recognized in the Universal Declaration and the International Covenant on Civil and Political Rights is another component of respecting the freedom indispensable for scientific research and creative activity. These norms include effectively protecting the freedom to express and communicate ideas, to travel within and outside of one's country, to assemble and form professional associations. In addition, the pursuit of science requires an environment that supports the freedom to pursue scientific research in accordance with ethical and professional standards without undue interference. Conversely, the freedom to undertake scientific research and creative activity implies a need for scientific responsibility and self-regulation. Scientific societies in many developed countries have adopted codes of professional ethics in pursuit of these goals. Many of these codes, however, are primarily concerned with the ethics of individual conduct and do not place the scientific enterprise in a sufficiently broad social and ethical context.

38. Article 15 (4) of ICESCR mandates that States Parties "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields." This requirement should be interpreted in conjunction with other obligations enumerated in ICESCR, particularly the language of Article 2. This provision

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[48] Art. 2, Declaration on the Use of Scientific and Technological Progress.
[49] Art. 6, Declaration on the Use of Scientific and Technological Process.
[50] Ibid., para. 39.
[51] Ibid., para. 40.

directs each State Party to undertake "steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized." Several instruments have tried to spell this out in somewhat greater detail. One section of the 1975 Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind states, for example, that "All states shall cooperate in the establishment, strengthening and development of the scientific and technological capacity of developing countries with a view to accelerating the realization of the social and economic rights of the peoples of those countries."[52]

General Issues and Problems

39. As noted above, current developments related to intellectual property are often inconsistent with a human rights approach. Yet the absence of accepted human rights standards for Article 15 suggests that they may more appropriately be characterized as problems than as violations. This section will outline some of these issues.

A. Inappropriate or Inadequate Protection of the Rights of the Author, Creator, or Inventor

40. Recognition of the claims of authors, creators, and inventors to moral and material benefit from their intellectual contributions is central to conceptualizing intellectual property as a human right and also serves as the major premise of intellectual property regimes. Therefore the manner in which intellectual property regimes determine eligibility for this entitlement is very significant. Current intellectual property law is problematic in a number of ways.

41. In many countries, the person filing the first intellectual property claim to a particular work is considered eligible for recognition as the owner. The first filer, however, may not be the true author of a work.

42. Intellectual property law is constructed around an eighteenth century paradigm of the author or creator as a single, solitary figure.[53] But this image often does not fit developments in the contemporary world. In science and technology, for example, researchers often work in large teams and collaborate across national boundaries. Scientific knowledge is additive; discoveries and inventions build on work by others conducted over a long period of time. This means that it is frequently difficult to separate out the relative contributions of various researchers. The many legal suits by members of research teams contesting ownership and control of patents reflect this dilemma.

43. Current intellectual property regimes, which were developed to suit the needs of an age of printing are often inadequate to deal with the challenges of new technologies. Intellectual property law generally assumes that there are practical limits on the ability to copy and distribute information or works of art. The advent of photocopying and audio and videotaping began to change the balance between the owners' and users' rights by facilitating the reproduction and

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[52] Art. 5, *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind.*

[53] This is a major theme in Boyle's *Shamans, Software & Spleens.*

dissemination of publications outside of the control of the intellectual property owner. The development of computer technology and the Internet has further complicated the protection of intellectual property. Once information is available in electronic form is can be distributed to a worldwide audience at little additional cost. The legal controversy over whether Internet sites, such as Napster, which facilitate the trading of electronic copies of music, are engaging in copyright infringement[54] is but one indication of the need for rethinking approaches to intellectual property protection. Efforts to develop standards for electronic publications that will protect the interest of authors and the integrity of their works are another. On the other side of the issue, some corporate interests have sought new and stricter intellectual property protections that will reduce scientific and public access to resources. The European Union, for example has passed legislation creating a *sui generis* form of intellectual property to protect database rights and in 1996 proposed that WIPO adopt a treaty on intellectual property protection for databases. The U.S. scientific community vigorously opposed this draft treaty and efforts to legislate similar protections in their own country arguing that it would undermine the ability of researchers and educators to access and use scientific data.[55]

44. Because the current system of intellectual property is built around the idea of originality, traditional/ indigenous knowledge and art forms cannot meet the criteria for copyright or patenting.

B. Inadequate Protection of the Public Interest

45. Traditionally, intellectual property regimes sought to balance the rights of creators with the interests of the public to have access to artistic works and technology products. The very existence of intellectual property rights was originally justified on the grounds that incentives and rewards to artists and inventors result in benefits to society. However, current developments tend to weaken these balances and to skew the system in favor of a much narrower range of interests.

46. Commercialization has changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism intended to encourage investment and protect the resources of investors. The privatization of the public domain reflects this transformation. Preserving the public domain is important because it serves as a resource for future creators and as raw material for the marketplace of ideas.[56]

C. Differential Impact on Developed and Developing States

47. The TRIPS Agreement requires all signatories to develop strong intellectual property protections. The year 2000 is the deadline for developing countries to comply; the least developed countries have an additional five years. It is claimed that such stronger intellectual property protection will contribute to increased investment in research and development, but

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[54] Amy Harmon, "For Many Online Music Fans, Court Ruling Is Call to Arms," *The New York Times*, July 28, 2000, pp. 1, C2.
[55] Chapman, " A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science," pp. 153-162.
[56] Boyle, Shamans, *Software, & Spleens*, 168.

there is little empirical evidence, even in industrial countries, that this is necessarily the case. While the patent system appears to have stimulated the development of new products and technologies in a few sectors, such as pharmaceuticals, in other sectors patents are often considered to have anti-competitive effects and may even slow the pace of innovation.[57]

48. Moreover, strict intellectual property models appropriate for advanced market economies are likely to disadvantage less developed countries. Despite the large number of developing countries decided to accede to TRIPS so as to attract foreign investment and to be considered eligible for technology transfers, developing countries generally believe that it is not in their economic interests to implement stronger patent laws. This is because intellectual property protection usually increases the cost of development. In the global economy, industrial countries currently hold 97 percent of all patents worldwide. More than 80 percent of the patents granted in developing countries belong to residents of industrial countries, usually multinational corporations from the most advanced economies.[58] Indeed 70 percent of global royalty and licensing fee payments are between parent and affiliate in multinational corporations.[59] This means that under strict enforcement of intellectual property law that the patents awarded and resulting payments for the use of these technologies will primarily benefit foreign multi-national corporations and not stimulate local research and innovation.

49. Moreover, few countries in the South have the requisite infrastructure to uphold strong patent systems.[60] The lack of a strong regulatory infrastructure also puts these countries at a disadvantage in shaping their laws to benefit from the openings that the TRIPS Agreement offers for countries to shape their patent laws to fit their needs.

D. Lack of Democratic Controls and Participation

50. Today, however, technology is leading rather than being shaped by governmental policy. The concentration of power in transnational corporations and these corporations' ability to find a common interest with personnel in patent offices and other government departments that shape and administer intellectual property regimes weakens the democratic process. Pressures imposed by economic globalization are shifting the balance even further away from citizens' control. One study describes the situation with regard to the formulation of intellectual property law as follows:

> Intellectual property laws are defined through closed, secretive international negotiations dominated by industry – and are then brought to national legislatures as faits accomplis, without democratic deliberation. Combined with the technical, arcane nature of intellectual property legal specialty, this has helped corporate interests to avoid public scrutiny and

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[57] Tansey, "Trade, Intellectual Property, Food and Biodiversity," pp. 4-5.
[58] United Nations Development Programme, Human Development Report 1999 (New York: Oxford University Press, 1999), p.68.
[59] Ibid.
[60] Amy E. Carroll, "A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law," *The American University Law Review* (1995).

expand their control over developments in applications such as electronic information, biotechnology or pharmaceuticals. Industrial country governments promote corporate interests in expanded intellectual property rights in the name of maximizing national competitiveness in a global marketplace.[61]

51. The World Trade Organization's role in standard setting, particularly in light of the closed nature of its proceedings and its lack of concern for democratic procedures or human rights principles, has been of particular concern to many nongovernmental organizations, human rights advocates, and environmental groups. The TRIPS Agreement not only sets minimum standards for national protection of intellectual property rights. It also imposes enforcement measures through an integrated dispute settlement system. A country that does not fulfil its intellectual property obligations faces the possibility of having trade sanctions applied against it. The power of the WTO has been described as "unprecedented in the field of intellectual property protection."[62]

E. Lack of Effective Incorporation of Ethical Concerns

52. A human rights approach conditions intellectual property regimes on their conformity with ethical and human rights principles. Some systems of patent law also explicitly require decision makers to consider moral standards as part of the process of evaluating applications. Nevertheless, morality has generally been given little import or ignored completely by those who have interpretive custody of the patent system. In part, this reflects the reluctance of patent officers to inject ethical considerations into their work. The patent community generally takes the position that morality has little to do with patent reviews, or, if it does, that the patent system is the wrong place to consider such issues. Patent officers are more likely to consider themselves as serving the business community with a mandate to issue as many patents as possible. Their goal is to encourage the development of science and technology and the competitive position of the country in a globalized economy. [63]

53. The patenting of life is a prime example. The landmark 1980 United States Supreme Court decision in *Diamond v. Chakrabarty* that extended patent eligibility to life forms, as long as they were altered or purified in some way, had significant ethical implications. Yet, the Court explicitly refused to take ethical factors into account in rendering a decision that has affected patent policy around the world. Instead, the Court assigned responsibility for such matters of "high policy" as the purview of political bodies, particularly in this case the U.S. Congress.[64] The dilemma is that political bodies generally prefer not to deal with patent policy. Thus the U.S. Congress has never debated the appropriateness of granting life patents, and the U.S. Patent and Trademark Office has been free to set policy without any meaningful ethical oversight by the courts or political representatives.

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[61] David Downes, "The 1999 WTO Review of Life Patenting Under TRIPS," Revised Discussion Paper, Center for International Environmental Law, Washington, D.C., September 1998, 1.

[62] Downes, "The 1999 WTO Review of Life Patenting Under TRIPS," 1.

[63] On this point see Peter Drahos, "Biotechnology Patents, Markets and Morality," *European Intellectual Property Review* 21 (September 1999): 441-449.

[64] Ibid.

54. Many groups within the religious, environmental, and traditional rights communities have expressed ethical concerns about the patenting of life forms. Rather than expressing an anti-technology position, this opposition often reflects a conviction that biological patents constitute a threat to the dignity and sanctity of life.[65] However, such groups have had little means of changing patent policies.

Negative Impact on Human Rights Enumerated in ICESCR

A. Detrimental Effects on Scientific Progress and Access to its Benefits

55. Until recently most developed countries provided extensive public funding for basic scientific research so as to assure widespread availability of and access to the findings.[66] Large government investments in basic research and development made it possible to argue that the conduct of scientific research, including the maintenance and distribution of scientific data, was a public good. Research scientists actively pursued dissemination of research results through publication and often seemed disinclined to patent their discoveries.[67]

56. An evolution of government policy, beginning in 1980 with the adoption of the Bayh-Dole Act in the U.S., has inclined many governments in advanced economies to encourage the private commercial development of publicly funded research. This development, in turn, has stimulated pressures for new and broader forms of intellectual property rights to protect economic investments. Commercialization has also changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism to encourage investment and protect the resources of investors.

57. Increasing intellectual property protection has imposed constraints on science's tradition of open publication. In many scientific fields, particularly the life sciences, some scientists are delaying publication and withholding data so as to secure intellectual property rights.[68] There is widespread concern in the scientific community that privatization, accompanied by legal restrictions and high prices, will restrict scientists' access to data needed for their research.[69]

58. Rather than stimulating research and applications, intellectual property claims can have negative effects and significantly increase costs. Two well-known intellectual property lawyers argue, for example, that the proliferation of biotechnology patents will deter innovation. They

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[65] For an analysis of the history and bases of the religious opposition to life patents, see Audrey R. Chapman, *Unprecedented Choices: Religious Ethics at the Frontiers of Genetic Science* (Minneapolis: Fortress Press, 1999), chapter four.

[66] Committee on Issues in the Transborder Flow of Scientific Data of the National Research Council, *Bits of Power: Issues in Global Access to Scientific Data*, (Washington, D.C.: National Academy Press, 1997), pp. 17, 133.

[67] Amy E. Carroll, "A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law," *The American University Law Review* 44 (Summer, 1995): n.24.

[68] Eliot Marshall, "Secretiveness Found Widespread in Life Sciences," *Science* 276 (25 April 1997), p.525.

[69] Committee on Issues in the Transborder Flow of Scientific Data, *Bits of Power*, p. 111.

characterize this situation as "the tragedy of the anticommons." Their thesis is that the fragmentation of property rights among too many owners will result in a situation where each can block the other. They also warn that the development of new products will require the bundling of agreements, something that scientists may find overwhelming to do. Thus the result will be that more intellectual property rights will lead to fewer useful products.[70]

59. This thesis already has ample illustrations. In 1998, a working group convened by the U.S. National Institutes of Health reported that a "serious threat" to science was being posed by patent holders who were making onerous demands on those who wanted to use their tools for research.[71] Analysts are predicting that the promising new field of human embryonic stem cell research is likely to be stymied because a very broad patent currently covers these cells, and as a result researchers will be almost entirely at the mercy of the patent holders.[72]

B. Detrimental Impacts on Realizing the Right to Cultural Participation

60. As noted above, current intellectual property systems are not applicable to indigenous artistic creations and knowledge. Moreover, very few countries have developed *sui generis* laws to protect indigenous artifacts and knowledge. The resulting situation is described as follows in the UNDP's *Human Development Report 1999*:

> New patent laws pay scant attention to the knowledge of indigenous people, leaving it vulnerable to claim by others. These laws ignore cultural diversity in creating and sharing innovations – and diversity in views on what can and should be owned, from plant varieties to human life. The result is a silent theft of centuries of knowledge from developing to developed countries.[73]

C. Detrimental Impacts on Realizing the Right to Health

61. The right to health includes access to appropriate health care. The present intellectual property system reduces the availability of pharmaceuticals in a variety of ways. By increasing development costs, intellectual property protection may hinder research and development of new drugs and technologies appropriate to smaller markets, such as the needs of developing countries. Patented drugs are almost always far more expensive than their generic counterparts. Patent holders, which are almost always corporations, have the freedom to price their products at arbitrary, often high levels that make many essential drugs beyond the means of poor persons lacking health insurance, which includes the majority of residents in less developed countries. For example, most of the 100,000 people suffering from multi-drug resistant strains of tuberculosis are resident in developing countries and thus unable to afford the new standard

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[70] Michale A. Heller and Rebecca S. Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research," *Science* 280 (1 May 1998): 698-700.
[71] Kyla Dunn,"Must Researchers Pay So Research Pays Off?" *The Washington Post*, October 1, 2000, B3.
[72] Ibid.
[73] United Nations Development Programme, *Human Development Report 1999*, p. 68.

combination treatment priced at approximately $15,000 per course.[74] Nor can the 26 million people in sub-Saharan Africa infected with HIV manage to pay for the antiretrovirals now available. Ironically and tragically, prices for medicines are often highest in the poorest countries. One study showed, for example, that the prices for many medicines are much more expensive in African countries than in Europe or the U.S.[75] Yet the pharmaceutical corporations holding patents have generally been unwilling to make drugs available at reduced rates in the poorest countries.

62. Supported by their own governments, multinational corporations have also sought to block governments in poor countries from exercising their legal rights to undertake parallel importing of drugs from cheaper sources of origin or to engage in compulsory licensing so that their people can have access to modern essential treatments. For example, when Thailand sought to produce or import low cost AIDS drugs, the U.S. government threatened it with the imposition of trade sanctions.[76]

63. Countries that have been willing to produce generics despite existing patent protection or engage in compulsory licensing have sometimes made dramatic breakthroughs in health care policy. Brazil has become a model in the fight against AIDS because of the government's decision to produce generic AIDS medicines and distribute them to patients free of charge or at a subsidized rate. Today, governmental laboratories produce five generic U.S. antiviral AIDS medications. Brazil has countered opposition from the U.S. pharmaceutical industry, arguing that WTO rules permit it to manufacture generic medications in a "national emergency."[77] Similarly, the Indian government has produced the AIDS treatment AZT at a cost of $48 a month as compared with $239 in the U.S. and Lariam, a treatment for malaria, at a cost of $4 as compared with $37 in the U.S.[78]

D. Detrimental Impacts on Realizing the Right to Food

64. Intellectual property regimes have threatened food security in several ways. The extension of very broad patents for specific plant varieties has meant that a few agricultural corporations have virtual monopolies on the genome of important global crops. Monsanto, for example, has been awarded a patent in Europe for all transgenic soybeans.[79]

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[74] "AIDS and Essential Medicines and Compulsory Licensing," summary a March 25-27 meeting in Geneva on compulsory licensing of essential medical technologies, http://222/cptech.org/march99-cl/report1.html.
[75] Donald G. McNeil, Jr., "Prices for Medicine Are Exorbitant in Africa, Study Says," *The New York Times*, June 17, 2000.
[76] Ibid.
[77] "Brazil Becomes Model in Fight Against AIDS," *The Washington Post*, September 17, 2000, A1, 24.
[78] McNeil, Jr., "Prices for Medicine Are Exorbitant in Africa, Study Says."
[79] Shulman, Owning the Future," 100-104.

65. The patenting regime has also enabled a small group of companies to gain control over ever-growing shares of the global market. In 1998, the top ten corporations controlled 32 % of the commercial seed industry and 85 % of the pesticide industry.[80]

66. Some of the patents granted for plants in the U.S. and Europe have been expropriated from other countries. This raises the issue of biopiracy whereby plants long cultivated in other cultures are patented outside their countries of origin without any benefits going back to the groups that developed them. When this takes place it generally precludes further local development and may increase the costs of production. In May 1998, Bolivians successfully defeated a U.S. patent application from Colorado State University for quinoa, a valuable food grain native to the Andes.[81] Other traditional developers have been less successful in thwarting the patenting of plant varieties.

67. The patenting of life, as called for under Article 27.3b of TRIPS, is also problematic for the conservation of indigenous methods of production and biological resources. Traditional cultures often have highly developed ecological knowledge and balanced relationships with their environments. This knowledge, combined with continued access to and the availability of natural resources, is essential for the survival of many indigenous groups. Provisions of TRIPS conflict with the protections offered to indigenous and traditional innovation, knowledge, and practices in the 1992 Convention on Biological Diversity (Articles 8j, 10c, 17.2, and 18.4).[82] The Convention on Biological Diversity commits the signatory nations to respect, preserve, and maintain traditional knowledge; to promote wide application of traditional knowledge; and to encourage equitable sharing of benefits from traditional knowledge.

68. Critics claim that plant patents also contribute to a loss of biodiversity. Once commercially viable products are patented, companies undertake massive marketing campaigns, often with the assistance of governments, promoting their products through special loans and grants tied to designated seed and chemical packages. As a result, vast monocultures are planted with genetically identical seed. This then leads to the disappearance of local plant varieties. Transgenic crops are also vulnerable to diseases and blights. If thousands of acres are planted with identical seed, a whole crop can be lost.[83]

69. Traditionally, farmers have had the right to save or replant seed from a harvest or to sell that seed to other persons. Corporations selling patented high technology seeds like Monsanto, however, require farmers to relinquish these rights and use the seeds only for one season. Under the license contract between the farmer and the company the farmer becomes the equivalent of a renter of plant germplasm. This arrangement has been described as a new kind of "bioserfdom" in which the new feudal lords, the large agrochemical firms, gain their power and wealth by owning the information contained within the new high-tech seed varieties rather than the land.[84]

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[80] Kristin Dawkins, "Intellectual Property Rights and the Privatization of Life," *GeneWatch*, 12 (October 1999): p. 6.

[81] Ibid., p 4.

[82] Convention on Biological Diversity, United Nations Environment Programme, 5 June 1992, Na.92-7807, http://www.ciesin.org/docs/010-000/Comv-BioDiv.html.

[83] Dawkins, "Intellectual Property Rights and the Privatization of Life," p. 4.

[84] Shulman, *Owning the Future*, pp. 90-9.

The agreement all farmers must sign to purchase these seeds grants Monsanto, or its authorized agent, the right to inspect and test the grower's fields planted with these seeds and to monitor the fields for an additional three years for compliance with the terms of the agreement. This obviously increases the cost of food production.

70. "Terminator" technologies constitute a further extension of these threats to farmers' rights. This process for genetic seed sterilizing has been called the "neutron bomb of agriculture" because genetically altered terminator seed will not germinate if replanted a second time. Like other genetically altered seeds, there is always the possibility that those treated with the terminator technology can cross-pollinate other plants. The U.S. Department of Agriculture has recently announced its intentions to commercialize this technology.[85]

Violations

71. As noted above, the absence of international human rights standards in the intellectual property field makes it difficult to utilize violations language. Nevertheless, the following clearly constitute violations.

(1) Failure to develop intellectual property regimes that reflect ethical and human rights considerations:

Even when legally mandated to do so under existing law, patent offices rarely consider the ethical dimensions of patenting. On those occasions that patent offices consider ethical concerns, they tend to construe moral criteria so narrowly that few, if any, tests are likely to exclude patent applications. The European Patent Office, for example, interprets Article 53 (a) of the European Patent Convention, which prohibits the grant of patents which would be contrary to "*ordre public* or morality," as only excluding patents whose exploitation would be "abhorrent to the overwhelming majority of the public" or a contravention of the "totality of accepted norms."[86] The technical Board of Appeal in a European case relating to plant genetic systems rejected the probative value of public opinion surveys and opinion polls that objected to patenting. The grounds were that these did not "necessarily reflect order public concerns or moral norms" and that the results of such surveys and polls "can fluctuate in an unforeseeable manner."[87]

(2) Uncompensated expropriation of traditional knowledge:

It has been estimated that in 1995 the market value of pharmaceutical derivatives from indigenous peoples' traditional knowledge amounted to U.S. $43 billion.[88] In a few cases, such

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[85] Jocelyn Kaiser, "USDA to Commercialize 'Terminator' Technology," *Science* 289 (4 August 2000).
[86] Drahos, "Biotechnology Patents."
[87] Ibid.
[88] Michael Blakeney, "What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?; Understanding the Value Chain," paper written from the Roundtable on Intellectual Property and Traditional Knowledge, World Intellectual Property Organization, Geneva, November 1 and 2, 1999, WIPO/IPTK/RT/99/3, p.9.

as the 1991 agreement between the Merck corporation and the Costan Rican Association Instituto Nacional de Biodiversidad, a non-profit organization, corporate developers have shared the benefits of commercial exploitation of traditional knowledge. In most, however, individual prospectors and corporate developers have expropriated the knowledge through filing patents in their own name without any form of remuneration.

Examples of this "biopiracy" include the following:

Ayahuasca: a small US company, the International Plant Medicine Corporation took out a US plant patent on a variety of ayahuasca native to the Amazonian rainforest. In 1999, a U.S. environmental organization filed a legal challenge on behalf of the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA) and the Coalition for Amazonian Peoples and Their Environment (Amazon Coalition). These groups objected to the patent because it appropriated a plant that is considered sacred to many indigenous peoples from this region. The patent was eventually voided on the ground that the claimed plant variety was not distinctive or novel, but the U.S. Patent and Trademark Office did not acknowledge the argument that the plant's religious value warranted an exception from patenting.[89]

Neem: Multinationals have filed dozens of patent claims on neem, a widely known and long-cultivated tree with medicinal and agricultural uses in Asia, especially in India. Monsanto, for example, has taken out patents on neem wax and oil and claimed broad fungicidal and insecticidal uses.[90]

Rosy periwinkle: Substances derived from Madagascar's rosy periwinkle flower have yielded the drugs vincristine and vinblastine, used respectively against Hodgkin's disease and juvenile leukemia, and have earned the patent holder, Eli Lilly & Company, some $160 million annually.[91]

Kava: Drug companies are racing to patent the many beneficial uses of this ceremonial beverage, which is grown in many of the Pacific island countries and Indonesia. The French cosmetic corporation L'Oreal, for example, has patented the use of kava to reduce hair loss.[92]

Mamala: the prostratin compound isolated from this Pacific medicinal plant belongs to the US Department of Health and Human Service, the US Army, and Brigham Young University.

(3) Interference in the intellectual property policies of other countries:

To further its foreign policy interests of promoting strict intellectual property regimes, the U.S. government has exercised considerable diplomatic pressure and threatened trade sanctions on a number of occasions. In 1997, for example, the U.S. government unilaterally imposed

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[89] http://ciel.org/ayahuascapatentcase.html.
[90] http://www.rafi.org.
[91] Shulman, *Owning the Future*, p. 131.
[92] Ibid.

import duties on $260 million of Argentine exports in retaliation for Argentina's refusal to revise its patent legislation to conform with U.S. standards. In April 1997, the U.S. State Department advised the Thai Government that draft legislation allowing Thai healers to register traditional medicines so as to retain them within the public domain would constitute a possible violation of TRIPS. The U.S. has also attempted to influence the development of patent laws and policies to suit U.S. interests in other countries, including Ecuador, India, Pakistan, South Africa, and Brazil.[93]

72. As more human rights advocates become involved with intellectual property issues, it is likely that many of the problems noted above will also be considered to be violations.

Recommendations

73. The recent Sub-Commission resolution on "Intellectual Property and Human Rights" makes a number of specific recommendations that pertain to governments and United Nations bodies that are important to implement.[94] These include the following:

(1) The resolution requests governments to protect the social functions of intellectual property in accordance with international human rights obligations and principles. One way to do so would be to have a mechanism for a human rights review/appeal of decisions by patent and copyright procedures.

(2) The resolution also requests inter-governmental organizations to integrate international human rights obligations and principles into their policies, practices, and operations.

(3) It further requests the WTO in general and the Council on TRIPS more specifically to take fully into account existing state obligations under international human rights instruments during its ongoing review of the TRIPS agreement. For this to happen in a meaningful way, however, it would first be necessary to gain recognition for the principle that human rights are fundamental and prior to free trade itself. Two experts have recently proposed that the interpretation of the primacy of human rights over trade liberalization is consistent with the trade regime on its own terms.[95]

(4) The resolution calls for a number of studies and reports. More specifically, it asks that the Special Rapporteurs on globalization an its impact on the full enjoyment of human rights to include consideration of the human rights impact of the implementation of the TRIPS Agreement in their next report. It requests that the United Nations High Commissioner for Human Rights to undertake an analysis of the human rights impacts of the TRIPS Agreement. The resolution also identifies a series of United Nations

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[93] Kristin Dawkins, "Intellectual Property Rights and the Privatization of Life," p.3.
[94] "Intellectual Property Rights and Human Rights," Sub-Commission on the Promotion and Protection of Human Rights, August 17, 2000.
[95] See Robert Howse and Makau Mutua, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization," Montreal: Rights & Democracy, International Centre for Human Rights and Democratic Development, 2000.

Agencies, including the World Intellectual Property Organization, the World Health Organization, the United Nations Development Programme, and the United Nations Environment Programme, and points to the need for them to continue and deepen their analysis of the impacts of the TRIPS Agreement, including a consideration of its human rights implications. And it asks the Secretary-General to provide a report on this issue at its next session.

(5) Significantly, the Sub-Commission encourages the Committee on Economic, Social and Cultural Rights to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject.

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Item 3 of the provisional agenda

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

DAY OF GENERAL DISCUSSION ORGANIZED IN COOPERATION WITH THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

"THE RIGHT OF EVERYONE TO BENEFIT FROM THE PROTECTION OF THE MORAL AND MATERIAL INTERESTS RESULTING FROM ANY SCIENTIFIC, LITERARY OR ARTISTIC PRODUCTION OF WHICH HE IS THE AUTHOR (ART. 15.1 (C) OF THE COVENANT)"

MONDAY, 27 NOVEMBER 2000

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

Background paper submitted by the International Commission of Jurists

GE.00-44704 (E)

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THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Introduction

A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht from 2 to 6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties' reports by the newly constituted Committee on Economic, Social and Cultural Rights, and international cooperation under Part IV of the Covenant.

The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, the Netherlands, Norway, Senegal, Spain, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat and the sponsoring organizations. Four of the participants were members of the Committee on Economic, Social and Cultural Rights.

The participants agreed unanimously upon the following principles, which they believe reflect the present state of international law, with the exception of certain recommendations indicated by the use of "should" instead of "shall".

Part I. THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS

A. General observations

1. Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.

2. The International Covenant on Economic, Social and Cultural Rights, together with the International Covenant on Civil and Political Rights and the Optional Protocol, entered into force in 1976. The Covenants serve to elaborate the Universal Declaration of Human Rights: these instruments constitute the International Bill of Human Rights.

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice.

5. The experience of the relevant specialized agencies as well as of United Nations bodies and intergovernmental organizations, including the United Nations working groups and special rapporteurs in the field of human rights, should be taken into account in the implementation of the Covenant and in monitoring States parties' achievements.

6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.

10. States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

12. The supervision of compliance with the Covenant should be approached in a spirit of cooperation and dialogue. To this end, in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, hereinafter called "the Committee", should analyse the causes and factors impeding the realization of the rights covered under the Covenant and, where possible, indicate solutions. This approach should not preclude a finding, where the information available warrants such a conclusion, that a State party has failed to comply with its obligations under the Covenant.

13. All organs monitoring the Covenant should pay special attention to the principles of non-discrimination and equality before the law when assessing States parties' compliance with the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant's objectives.

B. Interpretative principles specifically relating to Part II of the Covenant

Article 2.1: "to take steps ... by all appropriate means, including particularly the adoption of legislation"

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should be noted, however, that article 2.1 would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

"to achieve progressively the full realization of the rights"

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2.2 of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by every one of the rights recognized in the Covenant.

"to the maximum of its available resources"

25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. "Its available resources" refers to both the resources within a State and those available from the international community through international cooperation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant, attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

"individually and through international assistance and co-operation especially economic and technical"

29. International cooperation and assistance pursuant to the Charter of the United Nations (arts. 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political.

30. International cooperation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (cf. article 28 of the Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall cooperate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and cooperate in the realization of the rights recognized by the Covenant.

33. International cooperation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international cooperation and assistance pursuant to article 2.1 the role of international organizations and the contribution of non-governmental organizations shall be kept in mind.

Article 2.2: Non-discrimination

35. Article 2.2 calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.

36. The grounds of discrimination mentioned in article 2.2 are not exhaustive.

37. Upon becoming a party to the Covenant, States shall eliminate de jure discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

38. De facto discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

39. Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved.

40. Article 2.2 demands from States parties that they prohibit private persons and bodies from practising discrimination in any field of public life.

41. In the application of article 2.2 due regard should be paid to all relevant international instruments, including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination, as well as to the activities of the supervisory committee (CERD) under the said Convention.

Article 2.3: Non-nationals in developing countries

42. As a general rule the Covenant applies equally to nationals and non-nationals.

43. The purpose of article 2.3 was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2.3 should be interpreted narrowly.

44. This narrow interpretation of article 2.3 refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.

Article 3: Equal rights for men and women

45. In the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of the supervisory committee (CEDAW) under the said Convention.

Article 4: Limitations

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

"determined by law"[1]

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition on application of limitations on economic, social and cultural rights.

"promoting the general welfare"

52. This term shall be construed to mean furthering the well-being of the people as a whole.

"in a democratic society"[2]

53. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

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[1] The Limburg Principles 48-51 are derived from the Syracuse Principles 15-18, United Nations document E/CN.4/1984/4 of 28 September 1984 and Human Rights Quarterly, vol. 7, 1985, p. 5.

[2] Compare Syracuse Principles 19-21, idem.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights may be viewed as meeting this definition.

"compatible with the nature of these rights"

56. The restriction "compatible with the nature of these rights" requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

Article 5

57. Article 5.1 underlines the fact that there is no general, implied or residual right for a State to impose limitations beyond those which are specifically provided for in the law. None of the provisions in the law may be interpreted in such a way as to destroy "any of the rights or freedoms recognized". In addition article 5 is intended to ensure that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

58. The purpose of article 5.2 is to ensure that no provision in the Covenant shall be interpreted to prejudice the provisions of domestic law or any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected. Neither shall article 5.2 be interpreted to restrict the exercise of any human right protected to a greater extent by national or international obligations accepted by the State party.

C. Interpretative principles specifically relating to Part III of the Covenant

Article 8: "prescribed by law"[3]

59. See the interpretative principles under the synonymous term "determined by law" in article 4.

"necessary in a democratic society"

60. In addition to the interpretative principles listed under article 4 concerning the phrase "in a democratic society", article 8 imposes a greater restraint upon a State party which is exercising limitations on trade union rights. It requires that such a limitation is indeed necessary. The term "necessary" implies that the limitation:

(a) Responds to a pressing public or social need;

(b) Pursues a legitimate aim; and

(c) Is proportional to that aim.

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[3] The Limburg Principles 59-69 are derived from the Syracuse Principles 10, 15-26, 29-32 and 35-37, ibid. pp. 4-7.

61. Any assessment as to the necessity of a limitation shall be based upon objective considerations.

"national security"

62. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

63. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

64. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may be invoked only when there exist adequate safeguards and effective remedies against abuse.

65. The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

"public order (ordre public)"

66. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (ordre public).

67. Public order (ordre public) shall be interpreted in the context of the purpose of the particular economic, social and cultural rights which are limited on this ground.

68. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

"rights and freedoms of others"

69. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

D. Violations of economic, social and cultural rights

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, inter alia, if:

It fails to take a step which it is required to take by the Covenant;

It fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;

It fails to implement without delay a right which it is required by the Covenant to provide immediately;

It wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

It applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;

It deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

It fails to submit reports as required under the Covenant.

73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.

Part II. CONSIDERATION OF STATES PARTIES' REPORTS AND INTERNATIONAL COOPERATION UNDER PART IV OF THE COVENANT

A. Preparation and submission of reports by States parties

74. The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

75. The preparation of reports under article 16 of the Covenant could be facilitated by the implementation of elements of the programme of advisory services and technical assistance as proposed by the chairmen of the main human rights supervisory organs in their 1984 report to the General Assembly (A/39/484).

76. States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft. The preparation of reports should also be an occasion to review the extent to which relevant national policies adequately reflect the scope and content of each right, and to specify the means by which it is to be realized.

77. States parties are encouraged to examine the possibility of involving non-governmental organizations in the preparation of their reports.

78. In reporting on legal steps taken to give effect to the Covenant, States parties should not merely describe any relevant legislative provisions. They should specify, as appropriate, the judicial remedies, administrative procedures and other measures they have adopted for enforcing those rights and the practice under those remedies and procedures.

79. Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international cooperation in order to increase the relevance and comparability of data submitted by States parties in their reports.

80. Where necessary, Governments should conduct or commission studies to enable them to fill gaps in information regarding progress made and difficulties encountered in achieving the observance of the Covenant rights.

81. Reports by States parties should indicate the areas where more progress could be achieved through international cooperation and suggest economic and technical cooperation programmes that might be helpful toward that end.

82. In order to ensure a meaningful dialogue between the States parties and the organs assessing their compliance with the provisions of the Covenant, States parties should designate representatives who are fully familiar with the issues raised in the report.

B. Role of the Committee on Economic, Social and Cultural Rights

83. The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, its role is to consider States parties' reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties.

The decision of the Economic and Social Council to replace its sessional working group by a committee of independent experts should lead to a more effective supervision of implementation by States parties.

84. In order to enable it to discharge fully its responsibilities the Economic and Social Council should ensure that sufficient sessions are provided to the Committee. It is imperative that the necessary staff and facilities for the effective performance of the Committee's functions be provided, in accordance with Economic and Social Council resolution 1985/17.

85. In order to address the complexity of the substantive issues covered by the Covenant, the Committee might consider delegating certain tasks to its members. For example, drafting groups could be established to prepare preliminary formulations or recommendations of a general nature or summaries of the information received. Rapporteurs could be appointed to assist the work of the Committee, in particular to prepare reports on specific topics and for that purpose consult States parties, specialized agencies and relevant experts, and to draw up proposals regarding economic and technical assistance projects that could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations.

86. The Committee should, pursuant to articles 22 and 23 of the Covenant, explore with other organs of the United Nations, specialized agencies and other concerned organizations the possibilities of taking additional international measures likely to contribute to the progressive implementation of the Covenant.

87. The Committee should reconsider the current six-year cycle of reporting in view of the delays which have led to simultaneous consideration of reports submitted under different phases of the cycle. The Committee should also review the guidelines for States parties to assist them in preparing reports and propose any necessary modifications.

88. The Committee should consider inviting States parties to comment on selected topics, leading to a direct and sustained dialogue with the Committee.

89. The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, insofar as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant. The Committee should take due account of the indicators selected by or in the framework of the specialized agencies and draw upon or promote additional research, in consultation with the specialized agencies concerned, where gaps have been identified.

90. Whenever the Committee is not satisfied that the information provided by a State party is adequate for a meaningful assessment of progress achieved and difficulties encountered, it should request supplementary information, specifying as necessary the precise issues or questions it would like the State party to address.

91. In preparing its reports under Economic and Social Council resolution 1985/17, the Committee should consider, in addition to the "summary of its consideration of the reports", highlighting thematic issues raised during its deliberations.

C. Relations between the Committee and specialized agencies and other international organs

92. The establishment of the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialized agencies and other international organs.

93. New arrangements under article 18 of the Covenant should be considered where they could enhance the contribution of the specialized agencies to the work of the Committee. Given that the working methods with regard to the implementation of economic, social and cultural rights vary from one specialized agency to another, flexibility is appropriate in making such arrangements under article 18.

94. It is essential for the proper supervision of the implementation of the Covenant under Part IV that a dialogue be developed between the specialized agencies and the Committee with respect to matters of common interest. In particular, consultations should address the need for developing indicators for assessing compliance with the Covenant; drafting guidelines for the submission of reports by States parties; making arrangements for submission of reports by the specialized agencies under article 18. Consideration should also be given to any relevant procedures adopted in the agencies. Participation of their representatives in meetings of the Committee would be very valuable.

95. It would be useful if Committee members could visit specialized agencies concerned, learn through personal contact about programmes of the agencies relevant to the realization of the rights contained in the Covenant and discuss the possible areas of collaboration with those agencies.

96. Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realization of the rights recognized in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States parties to implement the Covenant and possibilities of technical and economic cooperation under article 22 of the Covenant.

97. The Commission on Human Rights, in addition to its responsibilities under article 19 of the Covenant, should take into account the work of the Committee in its consideration of items on its agenda relating to economic, social and cultural rights.

98. The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or other Covenant, there are several rights and provisions referred to in both instruments which are not susceptible to clear differentiation. both Covenants, moreover, share common provisions and articles. It is important that consultative arrangements be established between the Committee on Economic, Social and Cultural Rights and the Human Rights Committee.

99. Given the relevance of other international legal instruments to the Covenant, early consideration should be given by the Economic and Social Council to the need for developing effective consultative arrangements between the various supervisory bodies.

100. International and regional intergovernmental organizations concerned with the realization of economic, social and cultural rights are urged to develop measures, as appropriate, to promote the implementation of the Covenant.

101. As the Committee is a subsidiary organ of the Economic and Social Council, non-governmental organizations enjoying consultative status with the Economic and Social Council are urged to attend and follow the meetings of the Committee and, when appropriate, to submit information in accordance with Economic and Social Council resolution 1296 (XLIV).

102. The Committee should develop, in cooperation with intergovernmental organizations and non-governmental organizations, as well as research institutes, an agreed system for recording, storing and making accessible case law and other interpretative material relating to international instruments on economic, social and cultural rights.

103. As one of the measures recommended in article 23 it is recommended that seminars be held periodically to review the work of the Committee and the progress made in the realization of economic, social and cultural rights by States parties.

THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Introduction

On the occasion of the tenth anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter "the Limburg Principles"), a group of more than 30 experts met in Maastricht from 22 to 26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, United States of America) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

I. THE SIGNIFICANCE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population.[1] The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4 per cent of the global income and the richest fifth 85 per cent. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the State and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many States. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the State, although, as a matter of international law, the State remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of Governments for failure to meet their obligations in this area.

3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic,

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[1] UNDP, Human Development Report 1996, para. 29.

Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made firm commitments to address more effectively economic, social and cultural rights within the framework of seven United Nations world summit conferences (1992-1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed optional protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, States are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

5. As in the case of civil and political rights, the failure by a State party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles,[2] the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter "the Covenant"). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

II. THE MEANING OF VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Obligations to respect, protect and fulfil

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Obligations of conduct and of result

7. The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the

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[2] See above. The relevant Limburg Principles are: 70, 71, 72, 73.

obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Margin of discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

Minimum core obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights ... Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant".[3] Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

Availability of resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

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[3] See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (Fifth session, 1990) (E/1991/23, annex III, para. 10).

State policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Gender discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in the light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to comply

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligations for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through acts of omission

15. Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;

(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

III. RESPONSIBILITY FOR VIOLATIONS

State responsibility

16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

Alien domination or occupation

17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

Acts by non-State entities

18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.

Acts by international organizations

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and non-governmental organizations, should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

IV. VICTIMS OF VIOLATIONS

Individuals and groups

20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect, such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

Criminal sanctions

21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalizing persons for being homeless. Nor should anyone be penalized for claiming their economic, social and cultural rights.

V. REMEDIES AND OTHER RESPONSES TO VIOLATIONS

Access to remedies

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

Adequate reparation

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

No official sanctioning of violations

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretative aide in formulating any decisions relating to violations of economic, social and cultural rights.

National institutions

25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

Domestic application of international instruments

26. The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

Impunity

27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.

Role of the legal professions

28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.[4]

Special rapporteurs

29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the United Nations Commission on Human Rights should appoint thematic special rapporteurs in this field.

New standards

30. In order to further clarify the contents of States' obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

Optional protocols

31. The optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

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[4] Reproduced in ICJ Review, No. 55, December 1995, pp. 219-227.

Documenting and monitoring

32. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national Governments and international organizations. It is indispensable that the relevant international organizations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialized agencies and other international organizations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.